IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 2007 Session

STATE OF TENNESSEE v. TOMMY PLEAS ARWOOD, Jr.

Direct Appeal from the Circuit Court for Bedford County
No. 15091 Lee Russell, Judge

No. M2003-01125-CCA-R3-CD - Filed June 28, 2007

The Defendant, Tommy Pleas Arwood, Jr., appeals from his convictions on three counts of theft, two counts of burglary, and one count of evading arrest. On appeal, he alleges the following: (1) he was denied an effective appeal due to the lack of an official and reliable transcript of the proceedings; (2) the trial court erred in denying the Defendant's motions to dismiss and to suppress; (3) the evidence at trial was insufficient to sustain his convictions; and (4) the trial court erred in sentencing the Defendant. After a thorough review of the record and applicable law, we conclude that there are no errors in the judgments of the trial court, and we affirm those judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Andrew Jackson Dearing, III (at trial), Shelbyville, Tennessee, and Ralph O. Frazier, Jr. (on appeal), Nashville, Tennessee, for the Appellant, Tommy Pleas Arwood, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Charles F. Crawford, District Attorney General; Michael Randles, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts
A. Procedural History

In June 2002, the Defendant was indicted by the Bedford County Grand Jury on three counts of theft, two counts of burglary, and one count of evading arrest. In December 2002, Count 1 of the indictment, a theft charge, was severed from the other five charges to be tried separately. On

December 16 and 17, 2002, the Defendant was tried and convicted of two counts of theft, two counts of burglary, and one count of evading arrest, originally Counts 2 through 6. The Defendant was convicted of theft, originally Count 1, on February 18, 2003. A sentencing hearing was conducted on April 3, 2003, covering all the convictions from the two separate trials. A motion for a new trial was filed on April 30, 2003, and that motion was denied on May 1, 2003.

The Defendant filed his notice of appeal on May 7, 2003, and on October 3, 2003, this Court granted a motion by the Defendant to supplement the record with missing transcripts. The Defendant failed to supplement the record, and on February 17, 2004, this Court ordered the appropriate transcripts to be filed in the Bedford County Circuit Court Clerk's Office. The trial court reporter failed to file the appropriate transcripts, and a show cause order was filed on April 20, 2004. On May 12, 2004, the court reporter was found to be in contempt of court. On May 19, 2004, the first statement of evidence was authenticated by the trial court. From May 2004 until December 2005, a number of motions were filed pro se by the Defendant, which were denied by order of this court on December 29, 2005. Also on that day, the Defendant was ordered to file his brief in this matter.

On February 2, 2006, this Court recognized that the Defendant's counsel had been suspended from the practice of law by a Tennessee Supreme Court order dated January 10, 2006. At that point, new appellate counsel was appointed. On September 22, 2006, this Court ordered the case to be remanded to the trial court for the preparation of a statement of evidence to cover any still missing portions of the transcript. The second statement of evidence was prepared and filed by the trial court on January 23, 2007. Briefs and supplemental briefs were filed, and this case was orally argued on April 17, 2007.

B. Facts Presented at Trial on Counts 2 through 6

The following evidence was presented according to the available transcripts and the statement of evidence filed on January 23, 2007: Chief Deputy Dale Elliott testified that he was working at the Bedford County Sheriff's Department the night of February 22, 2002. He left the office around 11:00 p.m., and his drive home took him past Johnson Bolt & Screw. As he passed the store, a blue Oldsmobile without its lights on pulled out in front of him, nearly colliding with the marked police car he was driving. Chief Deputy Elliott testified he followed the car and observed it cross over the center line all the way to the line on the far side of the road. He then attempted to stop the vehicle by activating the blue lights and siren. The driver of the car refused to stop, and Chief Deputy Elliott followed the car until it pulled into the driveway of a house and stopped. Chief Deputy Elliott stepped out of his patrol car when the driver of the Oldsmobile put the car back into gear and drove off around the house through the yard. The car returned to the street where Chief Deputy Elliott again began to pursue the car. Another officer joined the pursuit, and they were ultimately able to force the car to stop.

When Chief Deputy Elliott approached the passenger side of the car, he recognized the passenger as Danny Joe Freeman. He also recognized the driver as the Defendant. Chief Deputy Elliott further testified that he observed six new drills, still in the original packaging, sitting in the

back seat of the car. The drills were connected together with a logging chain. Another officer went to Johnson Bolt & Screw to check for a break-in, and when it was discovered there had been a break-in, the Defendant and Freeman were arrested.

Chief Deputy Elliott testified that he was able to easily observe the tools in the back seat because there was nothing covering them up. The drills were in boxes, connected by a heavy chain, on the end of which was a master lock. There was also a Milwaukee saw. After the arrests, Chief Deputy Elliott went to Johnson Bolt & Screw where he observed that the glass panel in the front door was broken. Once he returned to the station, Chief Deputy Elliott discussed the break-in with Mr. Johnson, the owner of Johnson Bolt & Screw, and Johnson identified the tools found in the car the Defendant was driving. Mr. Johnson also gave a description of a number of other missing tools.

Chief Deputy Elliott testified that he then became interested in Shelly Rogers, who was brought in for questioning. She provided some information that led to a search warrant being obtained for Owen Prince's house. The other items that Mr. Johnson claimed were missing were found at Prince's house after a search. Mr. Johnson then identified the two saws seized from Prince's house.

On cross-examination, Chief Deputy Elliott testified that the car pulled out of the Johnson Bolt & Screw at a fairly slow rate of speed, but during the pursuit the cars approached fifty-five miles per hour. After the car was impounded it was searched, but nothing was found that may have been used to break the glass on the door of Johnson Bolt & Screw. Chief Deputy Elliott admitted that Rogers was very upset when she spoke with the police, she was concerned about going to jail, and she was concerned about Freeman. Rogers' information was the sole basis for the search warrant.

Lieutenant Trey Clanton testified that he was working the night of February 22, 2002, when he heard over the radio that Chief Deputy Elliott was attempting to stop a possible drunk driver. He fell in behind the Chief Deputy with his blue lights activated. Lieutenant Clanton then passed Chief Deputy Elliott, and they were able to force the car, which the Defendant was driving, to stop. The Defendant stated that he had been drinking and "shooting Dilaudids." He appeared to be intoxicated. Lieutenant Clanton then observed the same tools about which Chief Deputy Elliott had testified. All of the drills found in the car had cardboard sleeves around the cases except one. A sleeve purported to be the missing sleeve was found at Johnson Bolt & Screw.

Shelly Mary Rogers testified that she was Freeman's live-in girlfriend. The Defendant came to Freeman's house on February 22, 2002, and the three left in his "dark blue car." They drove around, drinking, until the Defendant dropped off Rogers and Freeman at Freeman's house. Freeman's brother arrived, and Freeman and his brother began arguing. The Defendant then took Freeman and Rogers to Rogers' sister's house. On the way, the Defendant stopped the car at Johnson Bolt & Screw. Rogers turned her head away when the Defendant stepped out of the car because she believed he was using the restroom, but, as her head was turned, she hear the sound of breaking glass. By the time she turned around, there were two saws in the car. She did not see

anyone enter or exit Johnson Bolt & Screw, and she did not see the Defendant put the saws in the car, but she assumed it was him because there was no one else in the parking lot. The Defendant then got into the car and pulled off.

As the group sped away from Johnson Bolt & Screw, Rogers testified that they discussed to whom the saws could be sold. Rogers came up with the name of Owen Prince. They drove there, Rogers and Freeman went inside with the saws, and they sold them for $250 or $300. The Defendant and Freeman split the money. They drove back by Johnson Bolt & Screw and realized that no police had responded to the scene, so they discussed making a return trip. The Defendant took Rogers to his sister's house, and he and Freeman left in the same blue car. After about ten minutes, Rogers saw the car pass by with police following. Once the Defendant and Freeman were arrested, Rogers was also brought to the police station, and she told the police about the saws at Owen Prince's house.

On cross-examination, Rogers testified that she and Freeman had been dating for over a year at the time of the break-in. The three had been riding around drinking since the early part of the morning on February 22, 2002, and she was first dropped off at her house at around 2:00 p.m. The Defendant came back over to her house around 6:00 p.m., and the three left around 7:00 p.m. after Freeman and his brother got into an argument. They again drove around drinking, and they eventually stopped at Johnson Bolt & Screw at about 10:00 p.m. When they arrived, Freeman appeared to be "passed out" with his head up against the window. Rogers reiterated that she did not see the Defendant actually break the door glass or take the saws because as soon as she turned around, the saws were already in the car. However, Rogers admitted she was extremely intoxicated. Rogers testified that, as the car drove off, Freeman woke up, and they proceeded to Prince's house. They stayed there for about fifteen minutes, stopped somewhere on the way home for fifteen minutes, and eventually got back to the Defendant's sister's house at about 11:30 p.m. Rogers admitted she had been convicted of passing a worthless check and charged with crimes associated with this case. However, she denied she had struck a deal with the State.

Alan K. Johnson, the owner of Johnson Bolt & Screw, testified that his business was open on February 22, 2002, from 7:00 a.m. to 5:00 p.m. He went home for the evening, but was later alerted by the Shelbyville Police Department that his store had been burglarized. Once he arrived at the store, he immediately noticed that two gas powered saws were missing, along with a number of cordless drills. He later identified the cordless drills at the police department. Each of the drills was priced at $209, for a total retail value of $1254. The Milwaukee saw that was taken had a retail value of $1400. Johnson identified the gas powered yellow and black saws the next day, and they were valued at $1099 apiece. Johnson stated he did not give anyone permission to break his door or take his things. On cross-examination, Johnson testified that he paid $162 dollars each for the drills, $525 dollars each for the gas-powered saws. One gas powered saw and two of the drills have since been sold.

The Defendant testified that, at around 8:30 on the night of February 22, 2002, he received a call from Freeman who asked the Defendant to pick him up. The Defendant drove over, and Freeman and Rogers got into his car with two yellow saws. The Defendant admitted he knew the

saws were stolen when he picked up Freeman and Rogers. Freeman asked the Defendant to take them over to Prince's house, in exchange for a Dilaudid pill. Once they arrived at Prince's house, Freeman and Rogers went inside, and after fifteen minutes they returned to the car with money. They then proceeded to a friend's house, after which they went to the Defendant's sister's house. Freeman and the Defendant then left and "went back to Johnson Bolt & Screw." When they arrived, Freeman jumped out of the car, grabbed a few things, and threw them in the back.

On cross-examination, the Defendant denied a slip of the tongue when he said they "went *back* to Johnson Bolt & Screw." He denied he had been there before that night. He stated he did take Freeman to Johnson Bolt & Screw, but he denied ever entering the store. The Defendant admitted Chief Deputy Elliott was telling the truth in describing the pursuit. He also admitted opening the trunk for Freeman to put the stolen saws in, so they could be taken to Prince's house.

Based on this evidence, the Defendant was convicted of two counts of burglary, two counts of theft, and evading arrest.

C. Facts Presented at Trial on Count 1

The second trial, concerning Count 1 of the original indictment, occurred on February 18, 2003. Charles Nunley, an employee of Wal-Mart, testified that his job was to look for potential shoplifters. He was working in the Shelbyville Wal-Mart on January 15, 2002, when he saw the Defendant get a cart, proceed to the electronics department, and place a computer in his cart. The Defendant then picked-up a quart of transmission fluid, which he then paid for at the sporting-goods checkout. The Defendant did not pay for the computer at the register in the electronics department, or the one in the sporting goods department. The Defendant then took the bag with the transmission fluid in it, placed it on top of the computer, and proceeded to the front of the store. The Defendant had the receipt for the transmission fluid purchase, which he waived to the exit greeter, and he walked to his car. The Defendant did not pay for the computer at the cash registers at the front of the store.

Nunley testified that he approached the Defendant and told him he needed to return to the store to discuss the computer. Nunley examined the receipt, which showed the Defendant had not paid for the computer. Nunley asked the Defendant why he took the computer, and he stated it was because "he had a bad drug problem." Another employee called the police, and when they arrived they took the Defendant to jail. The Defendant did not have permission to take the computer, valued at $798, without paying for it.

On cross-examination, Nunley admitted that he did not take the computer out of the box to inspect it. He did not know if all the parts were in the box. There was no video of this event, although Wal-Mart will make a video if the event was caught on camera. Nunley testified that the Defendant appeared to be intoxicated during the events that day.

Based on this evidence, the Defendant was convicted by a Bedford County jury of theft of

property valued between $500 and $1000.

D. Sentencing

At the sentencing hearing on all six counts, the State put on evidence that the Defendant was on probation at the time of the crimes for Counts 2 through 6, and the Defendant was on bond for the arrests in Counts 2 through 6 when he committed the theft in Count 1. Additionally, he had previously been convicted of possession for resale of a schedule II drug, four separate convictions of theft over $500, misdemeanor escape from jail, third-degree burglary, passing a forged instrument, and attempt to commit a felony. Additionally, the State argued there were at least two other felony convictions in the presentence report, one from Davidson County and one from Georgia. The State asked that he be sentenced as a career offender due to his ten felony convictions. The State also argued the Defendant was a professional criminal, his criminal activity record was extensive, and he was on probation at the time of the offenses.

The Defendant testified that Freeman entered a plea of guilty in this case, and he received a five-year sentence as a Range II offender. The Defendant testified that he was not given an opportunity to make a statement into the presentence report. The Defendant stated that he had a substance abuse problem for a number of years, specifically with Dilaudid, and every crime he committed was in support of his drug habit. The Defendant felt bad for committing the offense, and he realized that the drug was slowly killing him.

On cross-examination, the Defendant reiterated that no one from the probation office came to talk to him while he was in jail. The Defendant admitted he had been arrested for criminal trespassing shortly before his arrest for the Johnson Bolt & Screw arrest, and he was on bond for the Wal-Mart charge when he committed the Johnson Bolt & Screw crimes. Additionally, he admitted he was convicted in Georgia for robbery and shoplifting over $1000 in Davidson County. He also admitted his parole had been revoked a number of times.

Dorothy Jean Arwood, the Defendant's mother, testified that this time she noticed a change in her son. He appeared to "grow up a little" after this most recent arrest. She blamed his problems on his drug use.

The trial court found the Defendant had nine prior felony convictions and that made him a career offender. The court also determined that the convictions in this case were not part of the same incident or scheme, and that he had an additional fifty prior felony and misdemeanor convictions. Thus, the Defendant was sentenced to six years on Count 1, twelve years each on Counts 2, 3, 4, and 5, and six years on Count 6. The court found that, because of his extensive criminal record, he was a professional criminal, and the offenses were committed while he was on probation in Rutherford County. However, the court determined each burglary and theft should be run concurrently: Counts 2 and 4, and Counts 3 and 5. Each was run consecutively: Count 1 - six years, Counts 2 and 4 - twelve years, Counts 3 and 5 - twelve years, and Count 6 - six years. This resulted in a total effective sentence of thirty-six years.

II. Analysis

On appeal, the Defendant alleges error in that he: (1) was denied an effective appeal due to the lack of an official and reliable transcript; (2) the trial court erred in denying his motion to dismiss the arrest warrants; (3) the trial court erred in denying his motion to suppress the results of the search; (4) there was insufficient evidence to sustain his convictions; and (5) the trial court erred in sentencing him.

A. Denial of Right to Effective Appeal

The Defendant specifically alleges that a number of occurrences contributed to the denial of his right to an effective appeal. First, the Defendant asserts that the Jointly Submitted Agreed Statement of Evidence was improper because the Defendant failed to submit his personal recollection. Second, the Defendant asserts that the transcripts prepared after the original court reporter became unavailable were prepared too long after the hearing, and they were prepared from a stenotype only. Third, the Defendant asserts that the transcript of the motion for a new trial hearing is incomplete, effectively waiving his claims on the motions to dismiss and suppress. Fourth, the Defendant alleges the order correcting, modifying, and supplementing the record failed to take the Defendant's position into account.

This issue was initially brought before this Court after the court reporter, Ms. Eve Vandohlen, failed to properly adhere to the duties set out in Tennessee Code Annotated section 40-14-307. *See State v. Gregory Bernard Grier*, No. M2003-03003-CCA-R3-CD, 2005 WL 1981902, at *4 (Tenn. Crim. App., at Nashville, Aug. 11, 2005) (discussing a similar occurrence with the same court reporter). Pursuant to Rule 24 of the Tennessee Rules of Appellate Procedure, we ordered a Statement of Evidence be prepared to cover portions of the transcript that a second court reporter was unable to transcribe. *See* Tenn. R. App. P. 24(c). That rule states, "If no stenographic report, substantially verbatim recital or transcript of the evidence or proceeding is available, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." Under Rule 24(c), the Appellee would then respond with objections, and the trial court would settle differences. Tenn. R. App. P. 24(c), (e).

However, in this case, the parties collaborated and produced a "Jointly Submitted Agreed Statement of the Evidence," authenticated on May 19, 2004. That statement was signed by the Defendant's counsel and the Assistant District Attorney. In the Defendant's first sub-assignment of error, he alleges Rule 24's requirements were not conformed to because he was not consulted when the statement of evidence was formed. He alleges this violated his Due Process and Equal Protection rights because the State did not provide him "with a 'record of sufficient completeness' to permit proper consideration of the issues the defendant will present for review." *Grier*, 2005 WL 1981902, at *4 (citing *State v. Draper*, 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990)). We disagree. Pursuant to an order from this Court, the trial court produced another Statement of Evidence contained in the Order Correcting, Modifying, and Supplementing the Record, filed on January 12, 2007. This Statement of Evidence followed the procedures outlined in the Tennessee Rules of

Appellate Procedure. It addresses the portions of the record that were previously determined to be incomplete, and it afforded the Defendant the opportunity to give his personal recollection of the testimony. The statement was approved by the trial court, and Tennessee Rule of Appellate Procedure 24(e) states, "Any differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court. Absent extraordinary circumstances, the determination of the trial court is conclusive." We do not conclude that extraordinary circumstances exist that would warrant disturbing the determination of the trial court.

The Defendant's second contention is that it was error to allow the court reporter to prepare a transcript from a stenograph that was more than one year old. We find no reason to invalidate the transcript simply because it was produced more than a year after the original stenograph. The Defendant has not alleged the stenograph was modified or diminished during the year, and the Defendant has failed to show any prejudice from this action. There is nothing in the record to indicate that the Defendant would be in a better position to prevail on appeal had the transcript been produced one month after the stenograph was made.

The Defendant urges us to consider *Grier* in our analysis of his sub-issues in this section. In that case, this Court addressed a case where the same court reporter absconded with the trial transcript. *Grier*, 2005 WL 1981802, at *1-2. This Court previously ordered a statement of the evidence be produced between the assistant district attorney and the defendant's trial counsel, who had since become an assistant district attorney. *Id.* at *7. On appeal, we determined the previous decision was in error, and the case was remanded to the trial court to determine if a fair appeal could be had on a new statement of the evidence; if it could not, a new trial was in order. *Id.* at *7-8. We stated:

> While the facts of this case are unique and hopefully will not be frequently found to exist in this State, the unusual combination of an absconding official court reporter in a felony case and the transfer of Defendant's appointed counsel from private practice to the employment of the very office that prosecuted Defendant, requires the result we reach.

Id. at *7. We view the facts of this case as distinguishable. The statement of the evidence was produced under circumstances not lending themselves to such problems. The Rules of Appellate Procedure address situations where a transcript is missing, and this transcript and statement of evidence was prepared accordingly. We find no reason to invalidate either the statement of evidence or the transcript prepared by the second court reporter from a stenograph. *See State v. Housler*, 167 S.W.3d 294, 296 (Tenn. 2005) (addressing Rule 24 and stating, "The trial court is in the best position to determine those matters necessary to provide a fair, accurate, and complete account of the proceedings upon which the appeal is based."); *Artrip v. Crilley*, 688 S.W.2d 451, 453 (Tenn. Ct. App. 1985) (identifying the trial court as the final arbiter of the transcript or statement of the evidence).

Finally, the Defendant alleges the transcript for his motion for a new trial is incomplete in that it failed to contain his discussion with the trial court concerning his preference that his position on the motions to dismiss and suppress not be waived. Our reading of the motion for a new trial transcript indicates that the trial court did note cursing by the Defendant and a statement that the trial court was going to hear arguments from the Defendant's counsel, not the Defendant. Defendant's counsel did indeed fail to allege problems with the motions to suppress and dismiss. The Defendant's attorney at this hearing argued that there was insufficient evidence and the sentence was improper. While the transcript does fail to include the substance of the Defendant's outburst, it is clear that the trial court disregarded the statements and only considered arguments made by counsel, and it was not error to so do. *See State v. Burkhart*, 541 S.W.2d 365, 371 (Tenn. 1976) (explaining that a Defendant may be pro se or represented by counsel, but not both); *State v. Lyons*, 29 S.W.3d 48, 51 n.2 (Tenn. Crim. App. 1999) (same).

B. Motions to Dismiss and to Suppress

The Defendant next contends the trial court improperly denied his motion to dismiss based on faulty arrest warrants and his motion to suppress the search of his car. The transcript of the hearing on these issues was also lost, but it was included in the Order Correcting, Modifying, and Supplementing the Record. The State argues that these issues have been waived due to their not being raised in the motion for a new trial. *See* Tenn. R. App. P. 3(e). Having determined the transcript of the motion for a new trial was complete despite not containing the substance of the Defendant's "outburst," which may or may not have included his concerns about these issues, we conclude that Defendant has waived these issues. *State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997); *State v. Ronnie Watson*, No. W2001-03084-CCA-R3-CD, 2002 WL 31258011, at * 1 (Tenn. Crim. App., at Jackson, Sept. 16, 2002) ("It is by now well settled that failure to raise an issue relative to evidence admission or exclusion in the motion for new trial waives that issue for purposes of appellate review. Our review of the defendant's suppression issue was waived when it was not included in the motion for new trial.") (citation omitted).

C. Sufficiency of the Evidence

The Defendant also challenges the sufficiency of the evidence for all of his convictions except evading arrest. When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this

Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

1. Count 1 - Theft between $500 and $1000

Count 1 concerned the Defendant's theft of a computer from a Wal-Mart. Tennessee Code Annotated section 39-14-103 defines theft as follows: "A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." Thus, the elements of theft are: (1) the Defendant knowingly obtained or exercised control over the computer; (2) the Defendant did not have Wal-Mart's effective consent to do so; and (3) the Defendant intended to deprive Wal-Mart of the computer. *See* T.P.I. Crim. 11.01.

Nunley, a Wal-Mart employee whose responsibility it was to prevent shoplifting, testified that he witnessed the Defendant place a boxed computer in his shopping cart. The Defendant then picked up a bottle of transmission fluid, which he paid for at that local register. He proceeded out the front door of Wal-Mart without paying for the computer. Nunley approached the Defendant in the parking lot, looked at the receipt, and found that the Defendant had not paid for the computer. The Defendant stated he took the computer because he was on drugs. Nunley testified the Defendant did not have Wal-Mart's permission to take the computer, and its retail value was $798. This is sufficient evidence to support the Defendant's conviction of theft of property valued between $500 and $1000.

2. Count 2 - Burglary

The first burglary conviction concerns the first break-in of Johnson Bolt & Screw. The elements of burglary are as follows: (1) the Defendant entered a building (Johnson Bolt & Screw) other than a habitation not open to the public; (2) the Defendant entered the building with the intent to commit, committed, or attempted to commit a theft; (3) the Defendant acted without the effective consent of Johnson; and (4) the Defendant acted either intentionally, knowingly, or recklessly. *See* T.C.A. § 39-14-402(a)(1), (3) (1997); T.P.I. - Crim. 14.01.

The evidence at trial concerning the first break-in viewed in the light most favorable to the State was that the Defendant, Freeman, and Rogers were driving around when the Defendant stopped at Johnson Bolt & Screw. Freeman was "passed out" in the front seat, while Rogers sat in the back, intoxicated. Rogers noticed the Defendant exit the car, and she heard glass breaking. She then noticed two saws had been thrown into the back seat, and the Defendant returned to the car. Rogers stated there was no one else present in the parking lot. Johnson testified that the store was closed at the time, and he did not give the Defendant permission to enter the store. He also testified the retail value of each of the first two saws was $1099. Evidence was also presented that the two saws were located at Prince's house, after he purchased them from Freeman and Rogers. Rogers stated that Freeman and the Defendant split the profits. This is sufficient evidence for a rational trier of fact to convict the Defendant of burglary.

3. Count 3 - Theft between $1000 and $10,000

This conviction concerns the Defendant's theft of the six Metabo Drills found in the back of the Defendant's car. Again, Tennessee Code Annotated section 39-14-103 defines theft as follows: "A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." The Tennessee Pattern Jury Instructions define "exercise control over property" as:

> [T]he right to direct how property, real or personal, shall be used or disposed. Generally one must possess the right of possession in property in order to exercise control over it. Such possession may be actual or constructive, sole or joint. Also, one may have the right to control property without having a possessory interest. In such instances, if the defendant takes some action with the intent to deprive the owner of the property, and the defendant did so knowingly and without the owner's effective consent, the jury would be justified in returning a verdict of guilty. Anyone who is in a position to take some action that deprives the owner of property is in a position to exercise control.

T.P.I. - Crim. 11.01.

The evidence at trial concerning the Metabo drills was that the Defendant led the Chief Deputy on a pursuit, only stopping when he was forced to by the police. The officers approached

the Defendant's car, and they saw the six Metabo drills sitting in the back seat. Johnson stated those drills were missing from his store, and the drills each sold at retail for $209, for a total value of $1254, and the Defendant did not have permission to take the drills. The evidence is sufficient to convict the Defendant of theft. A rational trier of fact could have concluded beyond a reasonable doubt that the Defendant knowingly exercised control over the drills worth more than $1000 but less than $10,000, without Johnson's consent, and with the intent to deprive Johnson thereof.

4. Count 4 - Burglary via Criminal Responsibility

Count 4 concerns the second break-in, which resulted in the Defendant taking the six Metabo drills mentioned above. The Defendant may be found guilty of burglary through the conduct of Freeman if the Defendant is found to be criminally responsible for Freeman's conduct. T.C.A. § 39-11-401 (1997). The Defendant is criminally responsible if, "Acting with the intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense." T.C.A. § 39-11-402 (1997). Thus, if the Defendant acted with the intent to promote or assist Freeman in committing the burglary, or if he intended to benefit in the proceeds of the burglary while aiding Freeman, he could properly be convicted of burglary. *See* T.C.A. § 39-14-402(a)(1), (3) (1997) (defining burglary); T.P.I. Crim. 14.01.

The evidence at trial, including the Defendant's testimony, was that the Defendant drove Freeman to Johnson Bolt & Screw. When they arrived, Freeman exited the car, took certain items, put them in the back of the car, and the two drove out of the parking lot only to be immediately embroiled in a pursuit by Chief Deputy Elliott. The evidence was sufficient that Freeman burglarized Johnson Bolt & Screw. Freeman entered Johnson Bolt & Screw intentionally, without the effective consent of Johnson, and committed a theft therein. There is also sufficient evidence for a rational jury to conclude the Defendant was guilty of burglary via criminal responsibility because he "acted with the intent to promote or assist the commission" of Freeman's burglary of Johnson Bolt & Screw.

5. Count 5 - Theft between $1000 and $10,000

Count 5 concerns the Defendant's first break-in, and his theft of the two saws. The evidence at trial, viewed in the light most favorable to the State, showed the Defendant took two saws from Johnson Bolt & Screw, without Johnson's consent. He placed the saws in his car, and drove to Prince's house, where Freeman and Rogers sold them. He split the proceeds with Freeman. While the Defendant's version of the events was different, this Court is not the arbiter of factual disputes or credibility determinations. *Liakas*, 286 S.W.2d at 859. Thus, this is sufficient evidence for a rational jury to conclude beyond a reasonable doubt that the Defendant committed theft. The Defendant is not entitled to relief on this issue.

D. Sentencing

Lastly, the Defendant challenges the trial court's determination that he was a professional criminal, and he alleges his sentence is excessive in relation to the crimes of which we was convicted. The trial court determined the Defendant had at least nine felonies that were proven at the sentencing hearing, and he had fifty prior misdemeanors and felonies as stated in the presentence report. The court determined the Defendant was a Range III Career offender. The trial court ordered Count 1 to be run consecutively to the other counts because the Defendant was on bond when that offense occurred. The court found the burglary and theft convictions associated with the first break-in should be run concurrently, as well as the burglary and theft convictions associated with the second break-in. However, the trial court determined the Defendant was a professional criminal, had an extensive criminal history, and committed some of the crimes while on probation. These findings, in the trial court's view, justified partial consecutive sentencing, which resulted in an effective sentence of thirty-six years.

When a defendant challenges the length, range or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.2d 400, 411 (Tenn. Crim. App. 2001).

Our review of the record indicates that the trial court followed the statutory sentencing procedure, thus our de novo review is performed with the presumption of correctness. The two challenged points, that the Defendant was a professional criminal and that the total sentence is excessive, address the trial court's determination that some of the sentences should be run consecutively. Tennessee Code Annotated section 40-35-115 states:

> (a) If a defendant is convicted of more than one (1) criminal offense, the court shall order sentences to run consecutively or concurrently as provided by the criteria in this

section.

(b) The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:

> (1) The Defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive; [or]
>
> . . . .
>
> (6) The defendant is sentenced for an offense committed while on probation[.]

There appears to be little proof in the record to support the contention that the Defendant's criminal activity actually acted as a major source of his livelihood, but the record is replete with evidence of the Defendant's extensive criminal history, including disorderly conduct, robbery, driving under the influence, driving under the influence, passing forged checks, shoplifting, shoplifting, shoplifting, driving with a revoked license, driving with a revoked license, burglary, marijuana possession, filing a false report, robbery, driving under the influence, petit larceny, driving with a revoked license, driving under the influence, assault and battery, evading arrest, driving with a revoked license, marijuana possession, theft up to $500, theft between $1000 and $10,000, a weapons offense, theft between $500 and $1000, theft up to $500, driving with a revoked license, escape from jail, theft between $500 and $1000, assault, theft up to $500, driving under the influence, theft up to $500, theft between $1000 and $10,000, public intoxication, failure to appear, driving with a revoked license, driving with a revoked license, failure to appear, theft up to $500, theft between $500 and $1000, theft up to $500, theft up to $500, driving with a revoked license, possession of schedule II drugs, and theft up to $500. Additionally, the trial court found the Defendant was on probation at the time he committed the offenses, which is reflected in the record. This is sufficient for the trial court to impose consecutive sentences.

In claiming the Defendant's sentence is excessive, the Defendant points to a case where a defendant committed a burglary, several robberies, and the crime spree concluded with a high speed chase that resulted in the deaths of two officers. *See State v. Sharfyne L'Nell White*, No. M2004-03071-CCA-R3-CD, 2006 WL644015 (Tenn. Crim. App., at Nashville, Mar. 9, 2006), *perm. app. denied* (Tenn. Sept. 5, 2006). The Defendant has also noted that he secured his GED while incarcerated in Georgia, and he was employed as a painter at the time of the incidents.

The Defendant has not cited any authority requiring this Court to compare sentences for similar crimes, and we conclude the sentence appropriately conforms to the considerations and purposes outlined in Tennessee Code Annotated sections 40-35-102 and 40-35-103. The Defendant is not entitled to relief on this issue.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the judgments of the trial court.

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ROBERT W. WEDEMEYER, JUDGE